Thomas Sheet Metal Co., Inc. *and* Sheet Metal Workers' Local Union No. 11. Case 15-CA-8841

27 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 13 July 1983 Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party adopted the General Counsel's exceptions and supporting brief as its exceptions and brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented is whether the Respondent unlawfully implemented a unilateral change by eliminating travel and zone payments to its employees. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to make these payments without giving prior notice to the Union or bargaining to an impasse. The judge did find, however, that the parties subsequently reached an impasse on the payment issue, tolling the Respondent's liability at that point. Contrary to the judge, we find that the parties reached an impasse in bargaining prior to the Respondent's implementation of the unilateral change.[1]

The facts are as follows. The Union has been a party to successive collective-bargaining agreements with the Sheet Metal Contractors Association of New Orleans, Inc. for some years. Although the Respondent has not been and is not now a member of the Association, it became signatory to the Association agreements from 1977 until the expiration of the previous contract on 31 July 1982. The Respondent has not become signatory to the current agreement between the Union and the Association, nor has it entered into a separate contract with the Union.

Under the terms of the expired contract, four concentric zone systems were established around the Louisiana cities of Bogalusa, Covington, Houma, and New Orleans. Each employer having a shop within a city's inner zone was exempt from the travel and zone pay obligations for all work performed within the zone, regardless of where its employees resided. For work performed outside the inner zone, the employer was required to pay the wage rate plus travel pay, an amount calculated by multiplying the jobsite's distance from the zone's center by 30 cents. Employees also earned cumulative 20-cent hourly wage premiums for jobs in each zone beyond the inner free zone. Work performed in Mississippi, however, was only subject to an additional flat-rate payment of $6 per employee per day. The Respondent's shop is located in Bogalusa, whereas all of the Association members have shops in New Orleans.

Approximately 90 days before the expiration of the contract, in March or April 1982, Richard Thomas Sr. called Union President and Business Manager Stanley Gaudet to arrange a meeting to discuss relief for the Respondent from its obligation to make the $6 a day payments to employees on Mississippi work. Thomas Sr., Gaudet, and Union Financial Secretary and Assistant Business Manager Turcotte met at least once and possibly three times during this period to discuss Mississippi pay. Gaudet told Thomas Sr. that the Union would waive the $6 payments on future jobs bid in Mississippi against nonunion contractors if the Respondent requested such relief in time for the Union to give the other union contractors the same opportunities for bidding.

The Union and the Association negotiated a successor contract in the summer of 1982 which was effective on 1 August 1982. This contract contained zone and travel pay provisions identical to those in the expired agreement. There were no other discussions between the Respondent and the Union until after the previous contract had expired. Then, in August 1982, Turcotte met at the Respondent's office in Bogalusa with Thomas Sr. and his two sons. The primary topic of discussion was the Respondent's inability and unwillingness to pay travel pay to its employees working in New Orleans. The Respondent took the position that it would sign the recently negotiated Association agreement as long as it did not contain travel pay provisions. Specifically, Thomas Sr. told Turcotte that, unless the travel pay provisions were eliminated, he might as well close his doors. Turcotte became angry and threatened to expel the Thomases from union membership.

Around 21 September 1982 one of the Respondent's employees called Gaudet and informed him that Thomas had told the employees he was "going non-union" the next day. Gaudet was unable to reach Thomas until about a week later. Thomas told Gaudet in that telephone conversation that he

[1] In view of our decision herein, we find it unnecessary to rule upon the judge's findings as to the Respondent's period of liability.

could no longer afford to make travel and zone payments and that he would not make those payments. When Thomas Sr. subsequently met with Gaudet and Turcotte he told them that he felt it was unfair for him to have to pay travel and zone pay and that he needed relief. The Union suggested that the Respondent could reduce its costs by utilizing the Union's apprenticeship program and/or by establishing more shops from which the travel and zone pay could be calculated.

Thomas Sr., Gaudet, and Turcotte again met around mid-October 1982 after the Respondent had stopped, without prior notice to the Union, paying travel and zone pay to some employees.[2] Gaudet asked Thomas if he would pay all of the employees the required zone and travel pay, but Thomas held to his position that he would not make those payments.

The parties met several more times, including once in January 1983, with an International representative from the Union, but it was clear that neither the Respondent nor the Union would make concessions on travel and zone pay. In fact, throughout the entire negotiations the Union never offered the Respondent anything other than the Association agreement which required travel and zone pay, and the Respondent never offered any proposal short of signing the Association agreement without travel and zone pay provisions.

Counsel for the General Counsel argued, and the judge concurred, that the Respondent had presented the Union with a fait accompli and accordingly had violated Section 8(a)(5) and (1) of the Act by implementing its unilateral change. In contrast, the Respondent asserts, and we agree, that the parties did engage in negotiations about travel and zone pay to the extent that the parties had reached an impasse prior to the implementation of the unilateral change.

As stated by the Board in *Hi-Way Billboards*, 206 NLRB 22, 23 (1973):

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. . . . Once a genuine impasse is reached . . . the employer can . . . make unilateral changes in working conditions if they are consistent with the offers the union has rejected . . . . [Footnote omitted.]

The only factor preventing the parties here from reaching a new collective-bargaining agreement was the single bargaining issue of travel and zone pay. There is no allegation that the Respondent engaged in anything other than good-faith bargaining or that it expressed any animus against the Union by conduct away from the bargaining table. In fact, the Respondent initiated most of the discussions relating to these provisions. Given the parties' respective positions as to travel and zone pay, it appears that they may have been deadlocked almost from their first meeting. At the very least, by late September 1982, before the unilateral changes were implemented, it was clear that both the Respondent and the Union had maintained their respective positions steadfastly from the commencement of bargaining and were unwilling to make any concessions. See *R. A. Hatch Co.*, 263 NLRB 122 (1982). In light of the single-issue bargaining, conducted in good faith by the parties, the fact that neither party made any significant concessions or proposals at any time, and the obvious intentions of both parties to adhere to their respective positions regarding travel and zone pay, we find that the parties had reached a bargaining impasse no later than the end of September 1982.

Accordingly, we find that by ceasing to make travel and zone payments the Respondent did not violate Section 8(a)(5) and (1) of the Act because it had bargained to an impasse with the Union prior to the implementation of this unilateral change and implemented a change which was consistent with its prior bargaining proposal.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Bogalusa, Louisiana, on April 27, 1983, upon the General Counsel's complaint, which alleges that on or about October 1, 1982, the Respondent unilaterally changed the wages and other terms and conditions of employment of its employees in violation of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

The Respondent generally denies that he committed any unfair labor practices, and apparently contends, inter alia, that any alteration in terms and conditions of employment was subsequent to the parties having reached an impasse in negotiations over that particular term.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of the counsel, I make the following

[2] The judge found that the Respondent had not made zone and travel payments since the expiration of the contract. We find, however, that the Respondent did not cease making those payments until early October 1982.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Thomas Sheet Metal Co., Inc. is a Louisiana corporation engaged as a sheet metal contractor with its principal place of business in Bogalusa, Louisiana. The Respondent annually performs services valued in excess of $50,000 in States other than the State of Louisiana. The Respondent admits, and I find, that at all times material it has been an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers' Local Union No. 11 (herein the Union) is admitted to be and I find is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

The Union represents employees of various sheet metal contractors in a geographical jurisdiction of New Orleans, Louisiana, and surrounding parishes.

The Union has negotiated successive collective-bargaining agreements with the Sheet Metal Contractors Association of New Orleans, Inc. (herein the Association). Certain nonmembers of the Association, including the Respondent, have been parties to the collective-bargaining agreements between the Association and the Union.

At the time of the events here, there were about 40 to 50 contractors whose employees the Union represented based in New Orleans. Of all the employers with which the Union had a collective-bargaining relationship, only the Respondent had its place of business outside New Orleans.

The most recent contract to which the Respondent was a party was effective from August 1, 1980, to July 31, 1982. In the summer of 1982, the Association and the Union negotiated a successor agreement which became effective on August 1, 1982. The Respondent, however, has never signed or become a party to this agreement nor did the Respondent participate in negotiations.

In addition to wages and other terms and conditions of employment in the 1980–1982 contract, as well as its successor, there is a provision calling for both zone and travel pay for employees working beyond 15 miles from the city where their respective employer has its shop. For New Orleans contractors, the focal point is Canal and Royal Streets in New Orleans. For other contractors it is, presumably, the city limits respectively of Homa, Bogalusa, and Covington. In brief, for work performed beyond a 15-mile free zone, each employee is entitled to a 20-cent-per-hour premium for each zone. The contract provides for six zones of 7-1/2 miles. Thus, the maximum zone premium is $1.20 per hour.

In addition to zone pay, each employee is entitled 30 cents per mile travel pay for any jobs beyond the 15-mile free zone.

Finally, for work performed in certain counties in Mississippi, employees receive the free zone wage rate plus $6 per day.

The zone and travel pay in the 1982–1985 contract is identical to that of the 1980–1982 contract.

For some time, the matter of zone and travel pay had been of concern to the Respondent, particularly inasmuch as most of its jobs were either in Mississippi or in the New Orleans area, both of which would require payment of zone and travel pay. Since the Respondent had to pay zone and travel pay for jobs in the New Orleans area, but the New Orleans contractors did not, this meant the Respondent was at a competitive disadvantage in bidding those jobs. Zone pay in Mississippi was of concern to the Respondent since its Bogalusa location meant that it, more than contractors out of New Orleans, would bid on Mississippi jobs.

Thus, officers of the Respondent had discussed the matter of zone pay with representatives of the Union. Indeed, Stanley Gaudet, the Union's president and business manager, testified that he was in favor of doing away with the zone pay for Mississippi, and so recommended to the membership. However, they voted to keep the zone pay in the 1982–1985 contract.

In an April 1982 meeting between Gaudet and Richard Thomas Sr., Thomas suggested that the zone and travel pay were burdensome and that something would have to be done about them. Gaudet suggested that Thomas might participate in the forthcoming negotiations, even though not an Association member, but Thomas declined to do so.

Nothing occurred following the April meeting until subsequent to the expiration of the 1980–1982 contract. Then sometime in September, Gaudet was advised by one of the Respondent's employees that they had been advised the Respondent was going to quit paying zone and travel on a job in Manderville, Louisiana, a town outside New Orleans and about 50 miles from Bogalusa. And in fact, since the expiration of the 1980–1982 contract, the Respondent has not paid employees zone or travel pay although the Respondent has abided by the other terms and conditions of the 1982–1985 contract relating to wages and fringe benefits.

The Respondent did not advise the Union in advance of its intention to cease paying zone or travel pay, nor was this a matter of discussion and negotiation until subsequent to the Respondent's determination to cease making these payments. From mid-September to the time of the hearing, various officials of the Respondent have met on numerous occasions with various officials of the Union, as well as an International representative, in an effort to resolve this problem.

In sum the Respondent's position has been that it will not sign the new collective-bargaining agreement unless the Union agrees to make a concession to the Respondent concerning zone and travel pay. The Union's position has been that if the Respondent will sign the new collective-bargaining agreement then, and only then, would the Union be willing to make a concession on zone and

travel pay.[1] The Union has indicated that it would do so, recognizing that the Respondent is at competitive disadvantage to the extent that it has to make zone and travel payments to employees that other contractors do not.

B. *Analysis and Concluding Findings*

The Union and the Respondent have had a collective-bargaining relationship which, of course, survives the expiration of any particular collective-bargaining agreement. Thus, the fact that the 1980–1982 contract expired on July 31, 1982, does not relieve the Respondent of its obligation to bargain with the Union concerning wages and hours and other terms and conditions of employment.

Moreover, it is settled that, even on the expiration of a collective-bargaining agreement, terms relating to wages, hours, and other conditions of employment terms remain in effect and cannot be altered unilaterally. E.g., *Cauthorne Trucking*, 256 NLRB 721 (1981), remanded 691 F.2d 1023, 1025 (D.C. Cir. 1982).

Here it is essentially uncontested by the Respondent that it made a unilateral change in an important term and condition of employment, namely, the hourly wage to be paid to employees for certain jobs as well as travel pay to those jobs. Notwithstanding that the zone and travel pay as to the Respondent may have been onerous, the fact is such were terms and conditions of employment to which the Respondent had voluntarily agreed and which were to continue in full force and effect until altered—either through collective bargaining or after impasse on that subject.

Notwithstanding that the parties may have reached an impasse concerning those items subsequently, there was no impasse when the Respondent first unilaterally determined to cease paying zone and travel pay. Not only was there not an impasse, there had been no negotiations at all between the parties concerning this matter.

The Union and the Association discussed zone and travel and agreed to renewal of the clause in the 1982–1985 contract. The Respondent was not a party to these negotiations nor was the Respondent bound by the Association's agreement. Nevertheless, the Respondent did not seek out the Union to negotiate different terms or even advise the Union that it intended to cease paying zone and travel after the expiration to the 1980–1982 contract to which it was a party.

Accordingly, it must be concluded that the Respondent did in fact unilaterally alter a substantial term of employment and thus violated its obligation to bargain under Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent unilaterally ceased paying employees zone and travel pay beginning in September 1982, I shall recommend that it cease and desist therefrom and make appropriate restitution to those employees.

But there is a question of what limits, if any, should be placed on the Respondent's backpay liability to employees for zone and travel pay. The analysis of this begins with noting that:

> In cases, like the one here, involving a violation of Section 8(a)(5) based on the respondent's unilaterally altering existing benefits, it is the Board's established policy to order restoration of the *status quo ante* to the extent feasible where there is no evidence that to do so would impose an undue or unfair burden on the respondent. [*Turnbull Enterprises*, 259 NLRB 934 (1982), citing *Allied Products*, 218 NLRB 1246 (1975), enfd. in relevant part 548 F.2d 644 (6th Cir. 1977).]

In ordering full restoration to the status quo ante in cases like this, the Board always makes a notation along the lines of, "there is no evidence that this action will cause any undue burden on Respondent." *Mead Corp.*, 256 NLRB 686 (1981). Such implicity means that where there is a showing of undue hardship the full restoration remedy will not be levied.

Thus, the court in *NLRB v. Cauthorne*, supra, rejected the argument that an employer who makes a pre-impasse unilateral change in wages or benefits cannot subsequently bargain in good faith to an impasse. The court found, as in the instant case, that a unilateral change of existing benefits after the expiration of a collective-bargaining agreement but before impasse was violative of Section 8(a)(5). But the court went on to find that there was subsequent negotiation during which an impasse was reached. To remedy the 8(a)(5) violation the court held that the respondent's make-whole liability should end on the date the parties reached impasse.

Although I am bound by the Board and not courts of appeals, the court's decision in *Cauthorne* is certainly not at odds with established Board policy. Indeed language in *Allied* and subsequent cases suggests that, in the proper case, backpay liability would be tolled. I believe this is such a case. I conclude that to order the status quo ante to some future date would cause a substantial and undue burden on the Respondent. Further, I conclude that the Respondent's unilateral act did not foreclose it from bargaining in good faith with the Union.

Of all the contractors with which the Union has a bargaining relationship, the Respondent is most affected by the zone and travel pay. Indeed, the Union seems to recognize this indicating that some relief would be forthcoming if the Respondent would sign the Association contract. To order full restitution here would have a substantial impact on the Respondent's ability to compete

[1] According to Gaudet at a meeting in early April, the Union's attorney told Thomas, "We already have a contract with you, and our position is that you are bound by this contract." This contention forms no basis of the complaint herein nor did the Union pursue it at the hearing.

for business, particularly in New Orleans. Zone and travel pay for the Respondent's Manderville jobs amounts to an additional $30 per day per man.

Subsequent to its unilateral action, the Respondent began bargaining with the Union concerning zone and travel pay. And at least by January, the parties were at an impasse in negotiations over this matter. The Respondent would not sign a collective-bargaining agreement which included zone and travel pay. The Union would not sign a collective-bargaining agreement different from the Association contract, although indicating that subsequent to the execution of an agreement some "relief" for the Respondent would be forthcoming. Inasmuch as zone and travel pay as set forth in the Association contract were items to which the Respondent did not have to agree, and stated it would not; and inasmuch as the Union's position was just as adamant that it would accept no less from the Respondent than it had from the Association, I conclude that there was in fact an impasse in negotiations voluntarily commenced between the Respondent and the Union prior to this proceeding. Indeed, had the Union not been insistent that the Respondent sign precisely the same contract it had with the Association, this dispute might have been resolved.[2]

After several conversations and meetings between representatives of the Union and the Respondent, Richard Thomas Sr. wrote the Union's International body. An International representative, Willard Bell, was dispatched to meet with the parties. He did so on January 23, 1983. During this meeting, according to Gaudet, Bell told Thomas:

> Well, how do you expect me to give you some help if you haven't even signed the contract? If you want me to talk to you, sign the contract, and maybe we can give you some help. But he [Thomas] would not sign the contract, and Mr. Bell couldn't do anything for him.

I believe that before this meeting there appeared some hope of reaching agreement on zone and travel pay (and therefore the contract). After Bell's pronouncement, absent one party or the other changing position there was none. Accordingly, I conclude that as of January 23, 1983, the parties bargained to impasse on the issue of zone and travel pay. I further conclude that the Respondent's liability for unilaterally refusing to pay same ended at that time.

I shall recommend the Respondent be ordered to reimburse each employee so entitled for zone and travel pay from August 1, 1982, to January 23, 1983, with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[3]

[Recommended Order omitted from publication.]

[2] This insistence forms the basis of the Respondent's defense relating to an alleged violation of the Federal antitrust laws, an issue I need not consider in view of my decision herein.

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).